United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2666

To be arged by
JOHN H. GROSS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2666

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN EGAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

John Egan appeals from a judgment of conviction entered on December 2, 1974 in the United States District Court for the Southern District of New York following a 14-day trial before the Honorable Frederick Van Pelt Bryan, United States District Judge, and a jury, and an 8-day trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 74 Cr. 454 was filed in six counts on April 25, 1974.* Count One charged Egan, and others not named as defendants, with conspiring to obstruct justice and to travel in interstate commerce to receive a bribe, in viola-

* Indictment 74 Cr. 454 superseded, as to Egan, Indictments 74 Cr. 230 filed on March 8, 1974, 74 Cr. 429 filed on April 18, 1974, and 74 Cr. 431 filed on April 18, 1974.

tion of Title 18, United States Code, Section 371. Counts Two and Three, respectively, charged Egan with evading income taxes and filing a false income tax return for the tax year 1969, in violation of Title 26, United States Code, Sections 7201 and 7206(1). Counts Four and Five, respectively, charged Egan with evading income taxes and filing a false income tax return for the tax year 1970, in violation of Title 26, United States Code, Sections 7201 and 7206(1). Count Six charged Egan with traveling in interstate commerce to receive a bribe in violation of Title 18, United States Code, Section 1952.

Prior to the first trial, Egan moved to dismiss the indictment claiming that his acquittal on charges in the Eastern District of New York precluded the Government from trying him here on the ground of double jeopardy. (Tr. 2-8).* Egan also moved to sever Counts Three, Four and Five from Counts One and Six. (Tr. 9-17). Judge Bryan denied both motions. (Tr. 6, 27-28).**

Egan's first trial began on June 4, 1974 and concluded on June 21, 1974, with the jury finding Egan guilty on Count Five and not guilty on Count Three. The jury hung on Counts One, Four and Six.

Egan's second trial *** commenced on October 21, 1974 and terminated on November 1, 1974, with the jury finding Egan guilty on Count Four and not guilty on Count Six.

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* "Tr." refers to pages of the transcript dated June 3, 1974, which is docketed as Document 23 on appeal. "Tr. B." refers to pages of the transcript of Egan's first trial before Judge Bryan. "Tr. M." refers to pages of the transcript of Egan's second trial before Judge Metzner. "Tr. E.D." refers to pages of the transcript of Egan's trial in the Eastern District of New York. "GX" refers to Government's Exhibits in evidence.

** Prior to the first trial, Judge Bryan granted the Government's motion to modify Count One of the Indictment by removing from that count the charge that Egan had conspired to obstruct justice. The court also dismissed Count Two of the Indictment on the Government's motion.

*** Before the second trial began, Judge Metzner granted the Government's motion to dismiss Count One.

On December 2, 1974, Judge Metzner sentenced Egan to two and one-half year's imprisonment on Count Four and one year's imprisonment on Count Five, to run concurrently, with a parole eligibility date of eight months. Egan is released on bail pending appeal.

Statement of Facts

The Government's Case

The Government's proof at trial established that Lieutenant John Egan, while commander of the Special Investigations Unit of the New York City Police Department (S.I.U.), took a $17,000 bribe to free a narcotics dealer and kept a total of some $38,000 which had been seized from various narcotics dealers after they were arrested by members of his unit.* The evidence against Egan was given by five corrupt policemen who had served in S.I.U. and three narcotics dealers who had money taken from them by unit members. The Government corroborated the witnesses' testimony by showing that Egan made large cash deposits in his numerous bank accounts shortly after the dates he was said to have received his share of the bribes and thefts.**

The Special Investigations Unit

S.I.U. was designed to be an elite group of approximately seventy New York City police detectives whose responsibility was to apprehend major narcotics traffickers. The unit was organized into teams of detectives each supervised by a sergeant and commanded by a lieutenant. (Tr. B. 7-10; Tr. M. 21-22). The evidence at trial demonstrated that some of the members of this unit were corrupt. The corrupt mem-

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* The additional tax owed by Egan for 1969 and 1970, respectively, was $334.31 and $15,500.00. (Tr. B. 1055, 1060).

** For the purposes of this appeal, the evidence presented at the two Southern District trials will be consolidated in one statement of facts, with differences noted where they exist.

bers sold narcotics they had seized, took bribes to release narcotics' traffickers, stole money from drug dealers they had arrested, planted evidence, used illegal wiretaps and perjured themselves at trial.

The McAlpin Hotel Arrest

At approximately one o'clock on the afternoon of December 6, 1969, S.I.U. Detectives Carl Aguiluz, Joseph Nunziata, Raymond Viera, John McLean and Pasquale Russo arrested Juan Bonfonte, Jorge Mesias, Jorge Pettit and Juan Fernandez in the Hotel McAlpin for possession of six kilograms of pure heroin which had been secreted in false-bottom wine jugs.

The detectives searched the prisoners and found two safe deposit box keys, one for a box at the McAlpin and one for a box at the Holiday Inn. Later, after being joined by Lt. Egan, they opened the safe deposit boxes and found large amounts of cash. (Tr. B. 10-18). The police officers then proceeded to remove an illegal wiretap from Fernandez' hotel room in the Holiday Inn and took the prisoners to the precinct where they were booked.*

Later that evening, Aguiluz, Nunziata, Egan, McLean, Viera, and Sergeants James O'Brien and Desmond Donogon met in the cocktail lounge at the Holiday Inn. McLean and Egan then left the lounge with a black portfolio containing the money taken from the safe deposit boxes that afternoon. About one-half hour later McLean and Egan returned to the lounge where McLean handed each of the police officers an envelope. Aguiluz testified at trial that his envelope

* A small part of the money, $3,945, was vouchered by the officers with the police department so that the arrest would not look suspicious. The complaint against Bonfonte and Pettit was subsequently dismissed in Criminal Court for lack of evidence. Fernandez and Mesias were released on bail but failed to appear to plead to their Indictment.

contained between $1,000 and $1,200 in cash. (Tr. B. 19-23, 28.) Six days later Egan made a $1,000 payment on his home mortgage. (GX 37).*

The Taft Hotel Arrest

On March 31, 1970, Detectives Carl Aguiluz, Joseph Novoa, Peter Daly and Sergeant Gabriel Stefania arrested Raoul Leguizamon and Alberto Diaz for possession of fourteen kilograms of pure heroin in the Hotel Taft.

Leguizamon sought to extricate himself and Diaz from their predicament by offering Aguiluz $50,000 to set them free. Aguiluz communicated Leguizamon's offer to his commanding officer, Lt. Egan, who had arrived at the hotel, and Egan responded, "Fine." (Tr. B. 32-34; M. 362-364). As a result of this offer and acceptance, Leguizamon took Aguiluz and Egan to a room in the hotel where Leguizamon told the occupant, a woman, that he was in trouble and needed $50,000. Reluctantly, she agreed to give Leguizamon the money and asked Leguizamon and the officers to return in twenty minutes.

At the appointed time, Aguiluz, Egan, Stefania, Novoa and Daly and the two prisoners returned to the room where the woman gave Aguiluz approximately $40,000 in cash. (Tr. B. 35-37, 190-192; Tr. M. 365-368). Instead of fulfilling their agreement, however, and freeing the prisoners, the police officers booked them at the Eighteenth Precinct and kept the money (Tr. M. 370).**

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* The evidence underlying the McAlpin Hotel incident was admitted in evidence at the trial before Judge Bryan but not offered at the trial before Judge Metzner.

** Aguiluz, Novoa and Daly later received $5,000 from Diaz' attorney to fix the case, but they also breached that agreement. (Tr. B. 208-211). Diaz was released on bail and became a fugitive. Leguizamon pleaded guilty and was sentenced to 7 years' imprison-

[Footnote continued on following page]

Later that evening, Egan, Novoa, Aguiluz and Daly took the prisoners to the Criminal Court at 100 Centre Street for arraignment. While Aguiluz and Daly were in court waiting to arraign the prisoners, Stefania, Novoa and Egan decided it was getting late and that they should split the money quickly and go home. Novoa went into the Criminal Court Building and told Aguiluz that he, Egan and Stefania were tired and anxious to split the money immediately. Aguiluz gave Novoa the key to the trunk of his car where he had earlier put the $40,000 taken from the prisoners at the hotel. (Tr. M. 29-31, 370-371).

With the money in hand, Novoa, Egan and Stefania went to the Holiday Inn at 57th Street where they rented a room and divided the money into five equal piles. Stefania and Egan each took a pile of $8,000 and left. Novoa took the remainder of the money and later that evening met with Aguiluz and Daly and gave them their shares. (Tr. B. 109-107, 702-705; Tr. M. 30-32).*

The 100 Kilo Case

In the late evening of April 14, 1970, Aguiluz, Novoa and Daly tailed four individuals in a vehicle to Fort Lee, New Jersey, where they stopped them. Daly planted a gun on one of the prisoners and the officers then took the four

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ment. He was released last year when the Government learned that his arrest had been the product of an illegal search and seizure and disclosed that fact to state authorities.

* Egan received his share, $8,000 in cash, on March 31, 1970. Between April 6, 1970, and April 10, 1970, he made four separate cash deposits totalling $7,500 in four separate bank accounts. They were as follows:

Date	*Amount*	*Exhibit*
April 6, 1970	$1,800	GX 114
April 8, 1970	1,000	GX 91
April 9, 1970	700	GX 98
April 10, 1970	4,000	GX 88

individuals back to New York, seized $1,200 from them and booked them at the 6th Precinct for possession of illegal documents and possession of a weapon. (Tr. B. 56-60). Egan, Stefania, Novoa and Daly subsequently split the $1,200, taking approximately $240 each. (Tr. B. 65).*

The Airport Incident

In the mid-afternoon of May 11, 1970, Aguiluz and Novoa, on the basis of information obtained from an illegal wiretap, detained three men and a woman on a street on the east side of Manhattan. They took them to a room in the Holiday Inn where one of the men, Wladimir Banderas, offered Aguiluz and Novoa all the money he had to forget they had ever seen the prisoners before. (Tr. M. 373-375, 453). The detectives agreed and Banderas gave them $15,000 in cash and $5,000 in Traveler's checks. One of the other individuals told Aguiluz that he had $5,000 in the Hotel Wellington and that he would be willing to contribute it if the detectives would release them.

Aguiluz accepted and went with him and the woman to the Hotel Wellington, took the $5,000, and returned with the prisoners to the Holiday Inn.** Egan arrived at the

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* Novoa, Daly and Aguiluz later seized 100 kilos of heroin from the prisoners and retained 5 kilos to use to plant evidence on defendants. The profit motive took hold, however, and the detectives sold the heroin for $56,000 rather than use it for "flaking." The facts underlying that transaction are fully set forth in this Court's opinion affirming Novoa's conviction. *United States* v. *Papadakis*, Docket No. 74-1847 (2d Cir., January 10, 1975), slip op. 1231.

The detectives later entered into negotiations with a lawyer to fix the 100 kilo case for $150,000 but the negotiations collapsed. (Tr. B. 218-219).

The evidence underlying the 100 kilo incident was admitted in evidence at the trial before Judge Bryan but not offered at the trial before Judge Metzner.

** Aguiluz also took the woman's wrist watch. (Tr. B. 238-239).

Holiday Inn, and Novoa and Aguiluz showed him the money that the prisoners had paid for their release. (Tr. M. 376-377).

In the meantime, Detective Daly had trailed three people to Kennedy Airport where he seized $112,000 from them. After receiving a phone call from Daly, Stefania joined Daly at the airport, and they took the prisoners to the Holiday Inn. There, Daly told Aguiluz that he had arrested three Latin Americans at the airport with a small quantity of narcotics; that he had seized $112,000 in cash from them; and that he had brought $56,000 of it back with him. (Tr. M. 35, 377-378).

Daly then told Egan, Stefania and Novoa that he had taken only $56,000 from the people he had arrested at the airport, neglecting to tell them that he had actually seized $112,000 and stashed $56,000 with a friend. (Tr. M. 378-379).

Novoa, Daly and Stefania went to the Eighteenth Precinct Stationhouse where they booked the prisoners that Daly had arrested for possession of a small amount of heroin. Aguiluz and Egan took the money to the Holiday Inn where they rented a room and put the money into five equal piles of approximately $14,000 each. Egan insisted, however, that Stefania did not deserve an equal share and proceeded to remove $4,000 from one of the five piles and put $1,000 on each of the remaining four piles, leaving one pile of $10,000 and four piles of $15,000. Egan then stuffed his $15,000 share into his jacket pocket and left the room. (Tr. B. 68-77; Tr. M. 379-381).

The next morning Aguiluz and Novoa took Banderas to the bank, got the proceeds from the Travelers' checks and released him and his companions. (Tr. B. 240-241; Tr. M. 461). Later Aguiluz, Novoa and Daly went to Long Island

where Daly got the other $56,000 he had given his friend at the airport for safekeeping. Daly, Aguiluz and Novoa split this money among themselves. (Tr. B. 243-246; Tr. M. 462-464).*

The 93rd Street Incident

Between 10:15 P.M. and 12:00 midnight on September 22, 1970, Sergeant James Sottile, and Detectives John Rivera and Luis Martinez, having received illegal electronic surveillance information, were watching an apartment building in the vicinity of East 93rd Street and Second Avenue in Manhattan where they had followed two suspected members of a Chilean drug ring. The officers saw two of the Chileans come out of the apartment building carrying paper bags, stopped them and discovered that the bags were filled with cash. Just then two more Chileans came out of the building carrying paper bags also containing money. The detectives returned all of the suspects to the apartment from which they had just exited. The apartment was searched and the officers found even more cash, but no narcotics. (Tr. B. 331-332).

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* Egan received his share of the money, $15,000 in cash, on May 11, 1970. Between May 27, 1970, and July 22, 1970, Egan made six separate cash deposits totalling $14,600. The deposits were as follows:

Date	*Amount*	*Exhibit*
May 27, 1970	$5,700	GX 99
May 29, 1970	5,500	GX 100
June 3, 1970	350	GX 101
June 15, 1970	300	GX 102
July 10, 1970	750	GX 103
July 22, 1970	2,000	GX 105

The cases against the people arrested at Kennedy Airport were dismissed for lack of evidence.

Banderas and his companions returned to Chile but were subsequently expelled to the United States by Chile, after they had been indicted federally by the Eastern District of New York. Neither the Government nor the Defense chose to call them as witnesses at Egan's Southern District trials.

Sottile told Rivera and Martinez that he would take the money, approximately $82,000, remove an illegal wiretap they had previously installed, and meet them at the Century Paramount Hotel. He told them to tell the Chileans to leave the country and never come back.

Later that same evening, Rivera, Martinez and Sottile met at the Century Paramount Hotel. Rivera and Martinez told Sottile that the money ought to be split into three equal shares. Sottile told them that Lt. Egan and the Sergeant deserved shares and that some money should be put aside for informants, the clerical men and equipment. Martinez and Rivera reluctantly agreed, took their diminished shares and left the hotel. Sottile took the remainder of the money and went to a phone booth near the hotel where he telephoned Egan and told him to meet him as soon as he could in the vicinity of 43rd Street and 12th Avenue, near the Circle Line pier. (Tr. M. 83-84, 209-211, 248-250).

Early that morning Sottile met Egan at the prearranged location and told him what had happened the previous evening. He gave Egan $12,000 in cash and told him that he had set aside money for the Sergeant and clerical men. Egan, unsatisfied with his share, took their shares, bringing his to approximately $15,000. (Tr. B. 337-340; Tr. M. 84-85).*

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* Egan received his share, $15,000 in cash, on September 23, 1970. Between September 24, 1970 and October 6, 1970, Egan made nine separate cash deposits in three different bank accounts totalling $11,400.

The deposits were as follows:

Date	*Amount*	*Exhibit*
September 24, 1970	$ 500	GX 10
September 25, 1970	1,400	GX 40
September 28, 1970	2,000	GX 41
September 29, 1970	1,200	GX 42
September 29, 1970	800	GX 111
October 1, 1970	3,000	GX 43
October 2, 1970	500	GX 44
October 5, 1970	1,000	GX 45
October 6, 1970	1,000	GX 46

Martinez and Rivera distrusted Sottile and later told him that they wanted some sort of acknowledgement from Lt. Egan that Sottile had given Egan his share. (Tr. M. 88, 213, 250). Sottile told Egan his problem, and reluctantly, Egan agreed to go to dinner with the three of them. (Tr. M. 89).

Egan, Sottile, Rivera and Martinez met for dinner at the Cafe Ole at 25th Street and Second Avenue. During the dinner, Sottile told Egan that Rivera and Martinez wanted some kind of sign that Egan had gotten his share. Egan replied, "There are certain things that go on around here that you do not ask any questions about." (Tr. B. 599-600; Tr. M. 214, 251).

The Olate Case

On November 19, 1970, Egan, Detective Edward Codelia and other S.I.U. detectives entered the apartment of Nicodemus Olate in Queens where they found $21,600. Egan produced a gun and a small bag of narcotics and told Olate that he had found them in the apartment and therefore Olate was under arrest.

Olate asked Codelia if it was possible to solve the problem in some way and they began discussing money. Olate's first offer to Codelia was $40,000; Codelia went across the room, talked with Egan, came back and rejected the offer. Olate's next offer, $50,000, was rejected in the same fashion. Finally, Olate offered $80,000. Codelia went to Egan, had a conversation and returned to tell Olate that the money was satisfactory but that Quintanella, who was in the apartment with Olate, would have to be arrested "by order of the chief."

Olate and Quintanella agreed, and Egan and Codelia then took Quintanella and the $21,600, and left.* (Tr. B. 748-813). The next day Olate gave the officers $60,000 which he had obtained from his wife's safe deposit box. (Tr. B. 831).

The Hoboken Case

In November 1970, Jose Jara agreed to purchase cocaine from Celestino Valverde,** a courier for a dealer named Raoul who lived in a hotel in Hoboken, New Jersey. Jara, in turn, had arranged to sell the narcotics to Mario Arrastia, a major cocaine retailer in New York City.

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* Only $500 of the $21,600 was vouchered with the police department. (GX 147). Between November 20, 1970, and November 25, 1970, Egan made four separate cash deposits totalling $2,300. They were as follows:

Date	*Amount*	*Exhibit*
November 20, 1970	$ 500.00	GX 49
November 23, 1970	500.00	GX 50
November 24, 1970	1,000.00	GX 51
November 25, 1970	300.00	GX 127

Between September and November, 1970, Olate and his partners had imported approximately 60 kilos of cocaine. On September 10, 1970, Olate had been arrested by Sottile and Aguiluz for selling two kilograms of heroin. Aguiluz stole $7,000 from him at the time. That arrest was a result of illegal electronic surveillance, but Olate was indicted by the state. He subsequently fled the country after the incident with Egan in Queens, but he was expelled by the Chilean junta after he was indicted federally in the Eastern District of New York. (Tr. B. 492-498, 816-817).

The evidence underlying the Olate incident was admitted in evidence at the trial before Judge Bryan but excluded by Judge Metzner at Egan's second trial.

** Valverde had been, and continued on occasion to be, a federal informant. On this occasion he was off on a frolic of his own and had no intention of reporting his entrepreneural venture to the Government. (Tr. M. 591).

On November 25, 1970, Jara went to the subway station at Sixth Avenue and 14th Street to meet Valverde who was bringing the cocaine from Hoboken. Unbeknownst to either Jara or Valverde, Officers Aguiluz, Sottile, Rivera and Martinez knew of the delivery as a result of illegal electronic surveillance information and were waiting to arrest Valverde. As Valverde left the subway train, Aguiluz arrested him and seized three kilograms of cocaine and approximately $15,000 in cash. Jara and a companion were arrested as they approached the subway station. Both Jara and Valverde were then taken to Jara's apartment on 19th Street, where Jara agreed to cooperate with the police officers by delivering the cocaine that afternoon to Mario Arrastia on 92nd Street and Broadway as had previously been arranged. (Tr. B. 248-253; Tr. M. 381-385, 617-619, 571-577).

Aguiluz then took Jara, who was carrying the cocaine, to a location a block away from where Jara was scheduled to meet Arrastia. Aguiluz parked his car, and when he returned, he saw Jara talking to Arrastia. Arrastia apparently became aware that he was being watched because he jumped into a gypsy cab driven by Nathaniel Hill and drove away. Sottile and Rivera who were on surveillance chased Arrastia in their automobile and cut him off. They got in the cab, put Arrastia and Hill in the back seat, and drove back to 95th Street where they searched the car and found approximately $18,000 in an attache case.

Aguiluz arrived, handed Arrastia the black bag containing the cocaine that Jara was supposed to deliver to him and said, "This is yours." (Tr. B. 561-562). Sottile then took Arrastia and Hill to the precinct, prepared a perjurious complaint and booked them for possession of narcotics. (Tr. B. 81-85).*

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* Arrastia was a fireman and lost his pension after a hearing at which Sottile and Rivera testified falsely about his narcotics

[Footnote continued on following page]

Aguiluz and Rivera returned to Jara's apartment on 19th Street. There, Aguiluz told Valverde that Jara deserved credit for delivering the cocaine to Arrastia but that, since Valverde was a bigger narcotics trafficker than Jara, he would have to give up more information. Valverde replied that, while he had no information, he could come up with money to secure his release. Aguiluz told Valverde it would cost him a hundred thousand dollars. Valverde replied that he only had fifty thousand dollars and that they would have to go to New Jersey to pick up the money. (Tr. B. 86-87; Tr. M. 386-387, 577-578).

Egan arrived at Jara's apartment, and Aguiluz told him that Valverde had agreed to pay $50,000 for his release but that they would have to go to New Jersey to get the money. Egan agreed but told Aguiluz that he had a previous appointment which he would have to take care of before they left for New Jersey. Aguiluz arranged to meet Egan later that night on the corner of Blecker Street and Sixth Avenue. (Tr. M. 387-388).

At the agreed upon time, Aguiluz, Jara and Valverde left Jara's apartment, picked up Egan and drove to Hoboken, New Jersey. Valverde told Aguiluz where to park in Hoboken and sent Jara to the Hotel Victor to tell Raoul to send some money. Jara went to the Hotel, but he was unable to find Raoul. He returned to the car and told Valverde and the officers that no one was there. (Tr. M. 388-389, 580-583, 621-623).

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dealings. (Tr. B. 276-277, 451). They recited facts that had occurred in another case and attributed them to their arrest of Arrastia. The criminal charges against Arrastia, however, were subsequently dismissed after a hearing in criminal court. (Tr. B. 433-435). Undaunted, Arrastia returned to the narcotics' business and was arrested on Indictment 72 Cr. 192 filed in this District which charged him with conspiring to import 16 kilos of cocaine from South America. He was extradited from Spain where he had fled, pleaded guilty and was sentenced to one year's imprisonment by the Honorable Charles L. Brieant, Jr.

The group then went back to Manhattan and had pizza. Later that evening they returned to Hoboken, and Jara again went to the hotel where this time he found Raoul and told him that Valverde was two blocks away from the hotel with policemen, and that he should give him the money because the police officers would not permit Valverde to come to the hotel. Raoul refused to give Jara any money and told Jara to have Valverde telephone him at the hotel. (Tr. M. 624).

Jara gave the officers the message whereupon Valverde telephoned Raoul and told him to send the money. (Tr. M. 390, 584, 624-625). Jara went back to the hotel, got $38,000 from Raoul and gave the money to Aguiluz. The quartet then proceeded back to Jara's apartment; Jara and Valverde left the car; and Aguiluz gave Egan $17,000. (Tr. B. 88-90, 322-323, 636-646).*

The next day Aguiluz met with Sottile, Rivera and Martinez and gave them their shares. (Tr. M. 219, 260-261).

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* On November 26, 1970, Egan received his share of the money, $17,000 in cash, taken from Arrastia at 95th and Broadway, from Valverde at the 6th Avenue subway stop, and from Raoul in Hoboken. Between November 27, 1970 and December 29, 1970, Egan made thirteen separate cash deposits, in five different bank accounts, totalling $7,716.00. The deposits were as follows:

Date	*Amount*	*Exhibit*
November 27, 1970	$ 400	GX 52
November 30, 1970	300	GX 13
November 30, 1970	300	GX 128
December 1, 1970	700	GX 142
December 1, 1970	2,000	GX 116
December 14, 1970	500	GX 53
December 14, 1970	500	GX 129
December 18, 1970	700	GX 54
December 21, 1970	500	GX 130
December 23, 1970	516	GX 131
December 28, 1970	300	GX 132
December 29, 1970	500	GX 16
December 29, 1970	500	GX 133

Summary Schedule

The schedule setting forth Egan's total cash deposits for 1970, correlated with the incidents testified to by the witnesses is as follows:

[*For the Convenience of Court and Counsel this Summary Schedule is printed on the opposite page.*] ☞

CASH DEPOSITS MADE TO JOE

Case	*Date*	*Amount of Cash Allegedly Received by Egan*
Taft Hotel	Mar. 31, 1970	8,000.00
Airport	May 11, 1970	15,000.00
93rd Street	Sep. 23, 1970	15,000.00
Hoboken	Nov. 25, 1970	17,000.00
TOTALS		55,000.00

HN EGAN'S ACCOUNTS — 1970

Date of Cash Deposit	*Amount of Cash Deposited*	*Government Exhibit Number*	*Total Deposited*
April 6	1,800.00	114	
April 8	1,000.00	91	
April 9	700.00	98	
April 10	4,000.00	88	7,500.00
May 27	5,700.00	99	
May 29	5,500.00	100	
June 3	350.00	101	
June 15	300.00	102	
July 10	750.00	103	
July 22	2,000.00	105	14,600.00
Sep. 24	500.00	10	
Sep. 25	1,400.00	40	
Sep. 28	2,000.00	41	
Sep. 29	1,200.00	42	
Sep. 29	800.00	111	
Oct. 1	3,000.00	43	
Oct. 2	500.00	44	
Oct. 5	1,000.00	45	
Oct. 6	1,000.00	46	11,400.00
Nov. 27	400.00	52	
Nov. 30	300.00	13	
Nov. 30	300.00	128	
Dec. 1	700.00	142	
Dec. 1	2,000.00	116	
Dec. 14	500.00	53	
Dec. 14	500.00	129	
Dec. 18	700.00	54	
Dec. 21	500.00	130	
Dec. 23	516.00	131	
Dec. 28	300.00	132	
Dec. 29	500.00	16	
Dec. 29	500.00	133	7,716.00
			41,216.00

The Defense Case

Egan took the stand in his own behalf and denied that he had received any illegal monies. He testified that on March 31, 1970 he went to the Taft Hotel and met with Aguiluz and Stefania after the arrest of Leguizamon and Diaz. He stated that he was not told that Leguizamon wanted to pay a bribe for his release and that he did not share in any monies which were apportioned in the Holiday Inn that evening. (Tr. M. 822-840).

Egan further testified that on May 11, 1970 he went to the Holiday Inn where Aguiluz, Novoa, Stefania and Daly were holding four prisoners inside the hotel and three others outside in a car. He admitted going with Novoa and Aguiluz to 310 East 55th Street where, with the help of a detective from the safe and loft squad, they picked a lock and broke into an apartment. But he denied knowing that any money had been taken that day, and he asserted that Aguiluz had never given him money in the Holiday Inn as Aguiluz had testified. (Tr. M. 840-854).

Egan also denied knowing that on September 22, 1970, Sottile, Rivera and Martinez had appropriated money from some Chileans on 93rd Street. He stated that Sottile had never given him money, and he also denied having had dinner with Sottile, Rivera and Martinez at the Cafe Ole as they had testified. (Tr. M. 855-857).

With respect to the Hoboken incident, Egan testified that, on the evening of November 25, 1970, Aguiluz told him that he was scheduled to meet a man named Jara later that evening and that Jara was to introduce him to a large-scale narcotics dealer.

Egan claimed that Aguiluz asked him to go along with him and impersonate a man who wanted to buy narcotics.

Egan testified that he agreed to this plan * and went with Aguiluz to 7th Avenue between 23rd and 24th Streets where together they waited for Jara. (Tr. M. 865-872).

Jara, according to Egan, appeared with Valverde, and they all got into Aguiluz' car, with Egan and Aguiluz in the front and Jara and Valverde in the back. Egan claimed that, while in the car, he had turned around to speak to Valverde when suddenly he realized Aguiluz was paying a toll at the Holland Tunnel. (Tr. M. 873). Egan claimed that he then turned to Aguiluz and said he thought the plan was that they were to go to downtown Manhattan, whereupon Aguiluz allegedly said, "Downtown Hoboken." Egan testified that he told Aguiluz to turn around, but Aguiluz, although a subordinate, continued on to Hoboken. (Tr. M. 873-875). Upon arriving in Hoboken, Jara left the car, make a phone call, came back and told the officers, "He is not at home. He is across the street but somebody is going to get him. Call back in about 20 minutes." (Tr. M. 876).

Egan testified that twenty minutes later Jara phoned again, returned to the car and then told the officers, "he is down there now." Jara then walked toward the Hotel Victor and returned minutes later to the car, saying "He doesn't believe you are down here. He won't come down." Valverde pursuant to Aguiluz' instructions, then went to see the dealer, but returned to say the dealer refused to meet anyone that night. Egan asserted that he was then driven back to Manhattan where he got into his car and drove home. (Tr. M. 876-879). Egan asserted that it was possible that Jara had gotten money on the trip to Hoboken, but that if that happened, Egan never saw the money delivered. (Tr. B. 1280).

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* During his direct examination, Egan testified that he had never been a detective and had spent 25 of his 30 years in the police force as an administrator. (Tr. M. 821).

Egan categorically denied that he went to Hoboken to obtain money or that he received any moneys as a result of the trip. (Tr. M. 880-881).

Egan admitted having made large cash deposits into savings accounts in 1970, but asserted that these moneys constituted the lifetime savings of himself, his daughter Mary Rogers and his son-in-law, William Rogers.* Egan claimed that between 1944 and 1970 he hoarded the money in a box in his home, because his wife was periodically hospitalized at Rockland State Hospital and he was fearful that he would have to pay for her hospitalization if Rockland State learned that he had substantial bank balances. (Tr. M. 882-884).

On cross-examination, Egan conceded that, although his wife had not been hospitalized from January 22, 1949 to September 15, 1958, he was purportedly hoarding cash during this period. He also admitted that while Mrs. Egan was hospitalized in 1965, he had kept $6,000 in the bank from which the hospital had never attempted to obtain payment for its services. (Tr. M. 888-889) He further admitted paying interest on a police pension loan and on a home mortgage while he was supposedly hoarding cash in a box which was drawing no interest. (Tr. M. 890).

Egan also stated that in 1966 Mrs. Egan's doctor had told him that her condition had stabilized, that after 1966 his wife was not rehospitalized, and that he reported regularly to the attending physician from 1966 to 1970 that his wife was doing well; yet he admitted that he made no cash deposits until six days after the Taft Hotel incident on March 31, 1970. (Tr. M. 897-907).

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* The Rogers did not testify at trial although they were available to be called. An analysis of their income and expenditures for the year 1970 showed that they received only $1,286.48 more in income than they had spent. (Defense Exhibit Y).

Egan claimed that the reason he had not deposited all of the supposed hoard at one time after he began to make deposits was that he did not want the Internal Affairs Division of the Police Department to investigate him, since he doubted that they would believe his story. (Tr. B. 1348-1349; Tr. M. 925-927). This was Egan's rationale for making fifty-eight separate deposits totaling $58,473.41 in nine different bank accounts during the period April 6, 1970 to September 22, 1971. (Tr. M. 923).

Egan asserted that his failure to declare bank interest on his 1970 income tax return was an oversight; yet he admitted taking a deduction of $24 on the same tax return for three boxes of bullets. (Tr. M. 927-929). He also admitted failing to declare bank interest of $4,423.40 on his 1971 tax return and $4,740.05 on his 1972 tax return (Tr. M. 930-931). Although Egan had declared interest income of $361.04 in 1968, he repeatedly claimed that his failure to declare large amounts of interest income on his 1970, 1971 and 1972 returns was the product of a negligent oversight, not an attempt to coverup his receipt in 1970 of a large amount of money. He admitted, however, that on a signature card opening a bank account on September 25, 1970, he wrote that he was self-employed when in fact he was a police officer. (Tr. M. 932). He also admitted that on a signature card opening a bank account at another bank on November 27, 1970, he wrote that he was retired when in fact he was still employed as a policeman. (Tr. M. 934-935).

Egan further conceded that he had never reported the trip to Hoboken to any supervising officer or noted it in any official police department report. (Tr. M. 951-952).

Egan's Trial in the Eastern District

Indictment 74 Cr. 312, filed in the United States District Court for the Eastern District of New York on April 19, 1974, charged John Egan and Peter Daly in one count with having conspired together, and with other named but unindicted co-conspirators, to defraud the United States and its departments and agencies in violation of Title 18, United States Code, Section 371. Specifically, the defendants were alleged to have obstructed and hindered the Internal Revenue Service in the collection of information used in assessing taxes and investigating tax violations. As part of this conspiracy, it was charged that the defendants and their co-conspirators had seized approximately $230,000 from narcotics suspects Luis Torres and Wladimir Bandera during their arrests without later reporting the true amount seized to the New York City Police Department or the Internal Revenue Service.

On May 3, 1974, Indictment 74 Cr. 348 was filed in the Eastern District of New York. Count One charged John Egan and Peter Daly with having conspired together and with other named but unindicted police officers to violate the civil rights of certain inhabitants of the State of New York, in violation of Title 18, United States Code, Section 371. The defendants and their co-conspirators were alleged to have used their authority as police officers to: (1) unlawfully conduct electronic surveillance of Guillermo Saavedra at the New York Hilton Hotel in Manhattan; (2) illegally appropriate for themselves approximately $230,000 from Luis Torres, Wladimir Bandera, *et al.;* and (3) unlawfully arrest Wladimir Bandera, Lilliana Torres, *et al.*, and hold them in custody at the Holiday Inn in Manhattan.

Count Two of Indictment 74 Cr. 348 charged that on or about May 11, 1970, Egan and Daly, together with other persons named but unindicted, appropriated for themselves

some $230,000 taken from Luis Torres, Wladimir Bandera, *et al.*, thereby depriving these latter persons of their right not to be deprived of property without due process of law, all in violation of Title 18, United States Code, Sections 242 and 2.

Indictments 74 Cr. 312 and 74 Cr. 348 were consolidated for trial purposes. Egan's trial commenced on May 10, 1974 before the Honorable Jack B. Weinstein, United States District Judge for the Eastern District of New York, and a jury. On May 17, 1974, the jury acquitted Egan on all counts.

ARGUMENT

POINT I

The Judgment of Acquittal in the Eastern District did not Estop the Government from Offering Proof Concerning the "Airport Incident" at Defendant's Southern District Trials for Tax Evasion and for Filing a False Tax Return.

Appellant asserts that his prior judgment of acquittal after trial in the Eastern District of New York on Count Two of Indictment 74 Cr. 348, which charged a criminal civil rights violation, necessarily determined his innocence of certain matters sought to be proved at his trial in the instant case. Specifically, he argues that it was error for the Southern District trial judges to permit the introduction of testimony concerning the receipt of moneys obtained as a result of the so-called "Airport Incident", because the not guilty verdict allegedly determined that Egan received no part of the moneys seized during that incident. This argument misconceives the applicable law, ignores the facts underlying the proceedings in both this District and the Eastern District and is patently devoid of merit.

Incorporated in the constitutional protections against double jeopardy is the doctrine of collateral estoppel, *i.e.*, "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future [prosecution]." *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970). *Accord, Harris* v. *Washington*, 404 U.S. 55, 56 (1971). But there is nothing about this salutary doctrine that purports to bar every future prosecution bearing some relation to a past proceeding. To the contrary, the burden falls upon the defendant, *United States* v. *Gugliaro*, 501 F.2d 68, 70 (2d Cir. 1974); *United States* v. *Tramunti*, 500 F.2d 1334, 1346 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3349 (1974); *United States* v. *Friedland*, 391 F.2d 378, 382 (2d Cir. 1968), to convince the trial judge that the verdict in his prior prosecution *necessarily* determined the matters sought to be precluded at his later trial. *Sealfon* v. *United States*, 332 U.S. 575, 580 (1948); *United States* v. *Gugliaro*, *supra*, 501 F.2d at 70; *United States* v. *Tramunti*, *supra*, 500 F.2d at 1346; *United States* v. *Zane*, 495 F.2d 683, 691 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3239 (1974); *United States* v. *Friedland*, *supra*, 391 F.2d at 382; *Adams* v. *United States*, 287 F.2d 701, 704 (5th Cir. 1961). In the usual case such as this one, where the prior determination has been based on a general verdict, this burden is especially difficult for the defense to overcome, since "'it is not often possible to determine with precision how the judge or jury has decided any particular issue.'" *United States* v. *Cioffi*, 487 F.2d 492, 498 n.8 (2d Cir. 1973), *cert. denied*, 414 U.S. 1151 (1974) (quoting with approval Justice Schaefer of the Illinois Supreme Court). Thus, "it is a rare situation in which the collateral estoppel defense will be available to the defendant." *United States* v. *Tramunti*, *supra*, 500 F.2d at 1346; see *United States* v. *Kramer*, 289 F.2d 909, 913 (2d Cir. 1961); *Adams* v. *United States*, *supra*, 287 F.2d at 703.

The test, as set forth by the Supreme Court, is that:

"Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, . . . a court [must] . . . 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ashe* v. *Swenson, supra,* 397 U.S. at 444; see *United States* v. *Gremillion,* 464 F.2d 901, 906 (5th Cir.), *cert. denied,* 409 U.S. 1085 (1972). Consequently, in order to prevail here, appellant must establish that by applying this analysis it is possible to "determine with certainty," *United States* v. *Cioffi, supra,* 487 F.2d at 498, that the jury in the Eastern District trial necessarily decided that he never participated in the receipt of proceeds of the "Airport Incident." However, an examination of the record of that prior proceeding including the evidence at trial, the defense summation and the court's charge, clearly reveals that the judgment of acquittal in the Eastern District could have been based on determinations plainly unrelated to the matters sought to be excluded in the instant case. Stated another way, the jury in the Eastern District case could have believed Egan was a recipient of moneys seized as a result of the "Airport Incident," yet still acquitted him of the crime charged in Count Two of Eastern District Indictment 74 Cr. 348.

Count Two of Indictment 74 Cr. 348 charged as follows:

> "On or about the 11th day of May 1970, within the Eastern District of New York, JOHN EGAN and PETER DALY, the defendants, and Joseph Novoa, Charles Worster, Gabriel Stefania and Carl Aguiluz, named herein as co-conspirators but not as defendants, wilfully, knowingly and unlawfully did take, extract and appropriate to themselves approximately $230,000 from Luis Torres, Wladimir Bandera, Lilliana Torres, Jorge Martinez Diaz, Guillermo Saavedra, John Doe, also known as 'Lito' and John

> Doe, also known as 'El Tio', thereby depriving the aforesaid individuals of a right secured and protected by the Fifth and Fourteenth Amendments to the Constitution of the United States, namely, the right not to be deprived of property without due process of law. (Title 18, United States Code, § 242 and § 2)."

One of Egan's principal contentions during the Eastern District trial was that none of the crimes for which he was standing trial, including the offense charged in this count, had been committed in the Eastern District of New York and that therefore venue was not proper in the Eastern District. Mr. Herwitz, counsel for appellant, carefully nurtured this point during the cross-examination of Gabriel Stefania, an unindicted co-conspirator, by showing that, while the police officers had seized a large amount of money from suspects at John F. Kennedy International Airport, which is located in the Eastern District, no decision was reached to appropriate the money until the officers reached the Southern District of New York:

> "Q. There was no talk of dividing the money up at John F. Kennedy Airport; is that correct?
>
> A. That is correct.
>
> Q. While you were there at the airport, you were doing what you felt was your legitimate duty as a supervising sergeant; is that right?
>
> A. That is correct.
>
> Q. Then what happened?
>
> A. After that we left. Daly and I took the prisoners, put them in my car, and headed back to Manhattan." (Tr. E.D. 252).
>
> * * * * *
>
> "Q. On the way into New York was there any discussion between you and Daly about dividing up the money?
>
> A. No, not about dividing up the money.

Q. Then you drove into New York, into Manhattan; is that correct?

A. That is correct.

Q. Can you tell me, Lieutenant, at any time while you were in Queens, on the way from John F. Kennedy Airport into Manhattan, did you make any agreement of any kind with Daly that you would take any of the money that had been seized from these three persons?

A. No, I had no conversation with him relative to that.

Q. Did you have any conversation with Daly at any time from the time you left John F. Kennedy Airport until the time you got to Manhattan, to the effect that you would deprive these men of any constitutional rights?

A. No.

Q. Was there any discussion between you and Daly that—on the way in from John F. Kennedy Airport—that you would take the money and divide it up with some other people?

A. No.

Q. As you sit here now, you didn't enter into any conspiracy with Daly, did you, at any time between the time you left John F. Kennedy Airport—and the time you got to John F. Kennedy Airport?

A. No.

Q. You didn't feel that you were committing any crimes of any kind up to that point, did you?

A. No.

Q. You did feel a crime sometime later?

A. Yes.

Q. But you had no belief or intent to commit any crime from the time you left John F. Kennedy Airport until the time you got to Manhattan?

A. That is correct.

Q. Is that correct?

A. That is correct.

Q. Of course—Did you know that John F. Kennedy Airport is in Queens and that is part of the Eastern District of New York—you knew that, did you not?

A. Yes, I do.

Q. You also know, do you not, that Manhattan is a different district; is that right?

A. That is correct.

Q. What is known as the Southern District of New York; is that right?

A. Yes.

Q. At any time while you were in the Eastern District of New York dirving from Kennedy Airport, did you intend to commit any crime or federal offense as far as you know?

A. No." (Tr. E.D. 256-259).

* * * * *

"Q. In other words, on the way in from JFK you did not make the determination—you hadn't decided whether or not you were going to really steal any of this money; is that correct?

A. That's correct.

Q. You made that decision later?

A. Well, I really didn't make the decision, but it transpired later on.

Q. You made the decision that you were going to participate in the theft of this money later?

A. Later.

Q. *And where were you when you made the decision to participate in the theft of the money that had been seized?*

A. *In the 18th Precinct* [*in Manhattan*].

Q. What time was that?

A. Sometime early in the morning of May 12th." (Tr. E.D. 263-264) (emphasis added).

The success achieved by this line of questioning is revealed by Judge Weinstein's colloquy with counsel after the cross-examination of Police Officer Stefania. Judge Weinstein stated that a serious venue problem had been raised by the cross-examination, (Tr. E.D. 339, 342), and that the case could more appropriately have been brought in the state courts or in the Southern District. (Tr. E.D. 341).*

Mr. Herwitz later discussed the venue issue with Judge Weinstein prior to the summations of counsel (Tr. E.D. 628-630), and then forcefully placed this issue before the jury during his summation. (Tr. E.D. 666-679). Judge Weinstein, recognizing the importance of the venue claim to the defense, gave a lengthy instruction on venue at the outset of his charge, which encompassed each of the three criminal charges pending against Egan.**

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* Somewhat later, Judge Weinstein concluded that the Government had offered sufficient evidence for him to conclude that venue, at least with respect to the conspiracy counts, was properly laid in the Eastern District. However, at Mr. Herwitz' request, Judge Weinstein agreed to submit the venue issue to the jury. (Tr. E.D. 396).

** "Although I have told you that each element of the crime must be proven beyond a reasonable doubt there is one element that you must find that is somewhat different and that deals with the question of venue.

The indictment alleges that each of the crimes charged took place in part in the Eastern District of New York. That is why we are trying this case here in the United States District Court for the Eastern District of New York. Under Federal Law a defendant has a right to be tried in the District wherein the crime with which he is charged was allegedly committed, at least in part. The Eastern District of New York includes Brooklyn, Queens and Nassau County, all of which figured in the testimony in this case. You must find that some part of the events constituting the crime charged in the indictment took place in the Eastern District of New York. And you must find that before you may find the defendant guilty of the crime he is charged with committing. It is not necessary that you find that John Egan personally was present in the Eastern District because, if you find that he was a part

[Footnote continued on following page]

of a conspiracy charged, then Mr. Egan is responsible for any acts committed in furtherance of that conspiracy, wherever they are committed and even if they are committed and even if they are committed before Mr. Egan joined the conspiracy. But the acts committed in the Eastern District of New York must have been committed at or after the beginning of the conspiracy. It is the defendant's theory that, if there was a conspiracy, it was entered into after everyone left the Eastern District on the night of May 11. And that the conspiracy charged was terminated on May 12 before everybody reentered the Eastern District on way to and into Nassau County. The Government's position is exactly to the contrary on those points.

Now, as to this issue of venue. It is necessary only that you be convinced by the preponderance of the evidence not that you be convinced beyond a reasonable doubt that a crime charged was committed in the Eastern District of New York. If you do not find by the preponderance of the evidence that that is so, then you must acquit the defendant of that crime and you needn't consider all of the the other issues and the details of the crime.

If you should find by a preponderance of the evidence that the crime charged was considered in the Eastern District of New York, then you must go on and consider the specifics of that crime and as to the specifics of the crime you have to find that beyond a reasonable doubt. Proof by a preponderance of the evidence may mean proof which leads you to find that the existence may be contested that is more probable than its non-existence.

I know that that may be somewhat confusing, but I think it is a simple enough concept. Venue must be proved by the preponderance of the evidence, which is a lesser degree of proof than beyond a reasonable doubt.

The elements of the crime I am about to describe to you must be proved beyond a reasonable doubt. Is that clear? But first you have to find by the preponderance whether some part of the crime was committed here in the Eastern District, in Queens, at Kennedy, or in Brooklyn on the way to New York or the next day on the way to Nassau driving through Brooklyn and Queens into Nassau." (Tr. E.D. 724-726).

At the conclusion of the court's charge, the defense moved to dismiss all counts on the ground that venue was improper as a matter of law. (Tr. E.D. 763).

In view of the heavy emphasis which the defense placed on the question of venue in its cross-examination and summation, and in view of the court's charge to the jury, appellant engages in sheer speculation when he asserts that the jury did not ground its verdict on a perceived failure to lay proper venue in the Eastern District. This conclusion gains additional support from statements of Mr. Herwitz, counsel for appellant, made during both the trials before Judge Bryan and Judge Metzner:

> "I agree that the decision in the Brooklyn case doesn't preclude the prosecution here under the income tax because of the fact that venue was in issue, among other things." (Tr. B. 1291). See also (Tr. B. 67-68, 1291-1292).
>
> * * * * *
>
> "Now, in [the Eastern District] case I argued to the jury and requested Judge Weinstein to charge on the question of venue, in other words, there was a question of whether if a crime was committed it was committed in the Eastern District or in the Southern District. Naturally, since you try one case at a time, I argued the venue question and at my request Judge Weinstein charged it. As a consequence, the determination by that jury, as a technical matter doesn't reveal whether it was based on the venue question, which I appreciated, which is why I assume that I am foreclosed, and I think I was foreclosed by Judge Bryan, from claiming res adjudicata and collateral estoppel." (Tr. M. 788-789).

It is simply impossible to say with any degree of certainty that the jury could not have concluded that any unlawful appropriation of money from the narcotics suspects occurred in Manhattan, in the Southern District, as opposed to the

Eastern District, where some of the money had initially been seized.*

Since the record of the prior proceedings reveals that the Eastern District jury did not "necessarily determine" the facts sought to be excluded here in a manner favorable to appellant,** the District Court properly declined to receive into evidence appellant's judgments of acquittal in the Eas-

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* The record reveals that improper venue was also a likely reason for the acquittal on the other Eastern District charges.

Indictment 74 Cr. 312 charged a conspiracy to defraud the United States by obstructing and hindering the Internal Revenue Service in obtaining information used for assessing and collecting taxes and investigating violations of the tax laws. Specifically, Egan and his co-conspirators were charged with seizing $230,000 from narcotics suspects without vouchering the money with the New York City Police Department or the Internal Revenue Service.

Count One of Indictment 74 Cr. 348 charged Egan and his co-conspirators with having conspired to violate the civil rights of certain narcotics suspects by unlawfully conducting electronic surveillance, illegally appropriating $230,000, and unlawfully detaining these persons.

On the basis of the cross-examination of Stefania, the defense summation, and the court's venue instructions, *supra*, the jury could certainly have found that the situs of the unlawful agreements alleged in these conspiracy counts was in the Southern District of New York. Moreover, the overt acts for both conspiracy counts were identical, and only the first overt act had its situs in the Eastern District of New York. Based on the defense summation and the court's instructions the jury plainly could have found that this overt act—a telephone call from JFK Airport to the Holiday Inn in Manhattan—preceded the commencement of either conspiracy.

** In any event, the defense never offered the complete transcript of the Eastern District trial to the Southern District trial judges for their consideration of the collateral estoppel issue. This failure to provide the District Court with the complete transcript constituted a waiver of any claim based on collateral estoppel. *United States* v. *Tierney*, 424 F.2d 643, 645 (9th Cir.), *cert. denied*, 400 U.S. 850 (1970); *United States* v. *Friedland*, 391 F.2d 378, 382 & n. 1 (2d Cir. 1968).

tern District. *Cf. United States* v. *Johnson,* 165 F.2d 42, 49 (3d Cir. 1947), *cert. denied,* 332 U.S. 852 (1948). For, where it cannot be said with certainty that a judgment of acquittal has necessarily determined any issue, admitting the judgment into evidence could only lead to juror confusion. In that circumstance, a refusal to admit the evidence would be error only if the trial court abused its broad discretion to exclude evidence of questionable relevance. See *Hamling* v. *United States,* 42 U.S.L.W. 5035, 5047 (1974); *United States* v. *Gottlieb,* 493 F.2d 987, 992 (2d Cir. 1974); Federal Rules of Evidence, Rule 403. No such abuse could conceivably be said to have occurred here.

POINT II

The Court's Supervisory Power Should Not Be Invoked.

Appellant claims that, even if a technical application of the doctrine of collateral estoppel would not preclude the admission of evidence concerning the "Airport Incident," the supervisory power of the Court of Appeals over the administration of criminal justice should be invoked to bar the introduction of this evidence. This should be done, appellant argues, because requiring him to run the gauntlet of prosecution twice with respect to the "Airport Incident," has been unduly burdensome and has amounted to prosecutorial harassment. This argument overlooks the fact that appellant had it within his own power to attempt a consolidation of all charges pending against him, but failed to seek this relief. Invocation of the court's supervisory power, which is after all to be exercised "sparingly," *Lopez* v. *United States,* 373 U.S. 427, 440 (1963), is hardly warranted when established procedures exist to prevent multiple trials, but those procedures are not followed.

Rule 21(b) of the Federal Rules of Criminal Procedure provides:

> "For the convenience of parties and witnesses, and in the interest of justice, the court *upon motion of the defendant* may transfer the proceeding as to him or any one or more of the counts thereof to another district." (emphasis added).

See generally 8 Moore, Federal Practice ¶¶ 21.01-.02, 21.04 (1975). If a pretrial motion under this rule had been made in the Eastern District, Egan might well have obtained a transfer of the Eastern District proceedings to the Southern District where a motion could have been made under Rule 13 of the Federal Rules of Criminal Procedure * to have all charges against appellant tried together.** Thus, although the Federal Rules of Criminal Procedure provided appellant an opportunity to obtain the very relief he now seeks, appropriate motions were not made by the defense.

Moreover, it is likely that the failure to move to have the Eastern District charges transferred to the Southern District and consolidated here was a deliberate, tactical decision by the appellant. The weakness of the Government's position on venue in the Eastern District case was

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* Rule 13 provides:

> "The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information."

See also Fed. R. Crim. P. 8.

** The two Eastern District Indictments, 74 Cr. 312 and 74 Cr. 348, were filed on April 19, 1974 and May 3, 1974, respectively. On April 27, 1974, appellant was indicted in the Southern District of New York on the charges for which he has now been found guilty. The trial on the two Eastern District indictments commenced on May 10, 1974. There was thus ample time to move for a transfer of the Eastern District charges.

doubtless apparent to appellant on the face of the indictments. Appellant may therefore have decided to confront these charges in the Eastern District in the hope of winning on the venue issue, since, if appellant had successfully moved for a transfer under Rule 21(b), he would have waived his right to contest that issue. 8 Moore, Federal Practice, ¶ 21.02 (1975); see *United States* v. *Angiulo*, 497 F.2d 440 (1st Cir. 1974), *cert. denied*, 43 U.S.L.W. 3239 (1974); *Jones* v. *Gasch*, 404 F.2d 1231, 1235 & n. 16 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

Furthermore, prior to the Southern District trial, appellant moved to have Counts One and Six of 74 Cr. 454 severed and tried separately from Counts Two through Five. This motion was based on the grounds that there had been a misjoinder and that counsel felt that, at a separate trial of Counts One and Six, the appellant, as in the Eastern District trial, could be kept off the stand, whereas if Counts One and Six were tried together with the remaining counts, appellant would be forced to take the stand in order to have any chance of being acquitted. (Tr. 15-16). The reason a transfer of the Eastern District charges was not sought may therefore have been to make it possible that appellant could confront *those charges separately* without having to take the stand in his defense, as he ultimately chose to do in his Southern District trials. Moreover, the request for a severance in the Southern District proceedings is hardly indicative of one who is greatly troubled by repeatedly running the gantlet of multiple trials.

Where, as here, a defendant has failed to invoke an established court procedure, because, at the time, invoking that procedure did not appear to be in his best interest, the defendant cannot later be heard to claim that prejudice resulted from the procedure not being followed. *See United States* v. *Cook*, 432 F.2d 1093, 1101-02 (7th Cir. 1970), *cert. denied*, 401 U.S. 996 (1971); *Carruthers* v. *Reed*, 102 F.2d

933, 938 (8th Cir.), *cert. denied*, 307 U.S. 643 (1939). If error was committed below, it was "invited" by the appellant and cannot now be raised on appeal. See *DeMarco* v. *United States*, 415 U.S. 449, 451 (1974) (dissenting opinion); *United States* v. *Dunham Concrete Products, Inc.*, 501 F.2d 80, 83-84 (5th Cir. 1974); *Trawick* v. *Manhattan Life Ins. Co.*, 484 F.2d 535, 539 (5th Cir. 1973); *United States* v. *Agueci*, 310 F.2d 817, 840 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); *cf. United States* v. *Friedland*, *supra*, 391 F.2d at 381; *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Koritan*, 182 F. Supp. 143, 145 (E.D. Pa.), *aff'd*, *United States* v. *Koritan*, 283 F.2d 516 (3d Cir. 1960).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.

JOHN H. GROSS,
LAWRENCE B. PEDOWITZ,
LAWRENCE S. FELD,
Assistant United States Attorneys,
Of Counsel.

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Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Olga C. Gromppp being duly sworn, deposes and says that She is employed in the office of the United States Attorney for the Southern District of New York.

That on the 21st day of March, 1975 She served a copy of the within Brief for the U.S. Atty - by placing the same in a properly postpaid franked envelope addressed:

Victor J. Herwitz
22 East 40th St.
New York, N.Y. 10016

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Olga C. Gromppp

Sworn to before me this
21st day of March, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975